IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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SUPREME COURT, U.S.

No. 79-5146

DAVID RAWLINGS,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC ADVOCATE
OFFICE FOR PUBLIC ADVOCACY
STATE OFFICE BUILDING ANNEX
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July 27, 1979

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TO THE SUPREME COURT OF KENTUCKY

The petitioner, David Rawlings, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kentucky entered on May 1, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky affirming petitioner's judgment of conviction was filed on February 17, 1978 and is unreported. The order of the Supreme Court of Kentucky granting discretionary review in petitioner's case was entered on November 14, 1978. The opinion of the Supreme Court of Kentucky affirming the opinion of the Kentucky Court of Appeals was filed on May 1, 1979 and is reported as Rawlings v. Kentucky, Ky., 581 S.W.2d 348 (1979). The mandate in petitioner's case was entered by the Supreme Court of Kentucky on May 22, 1979. Copies of the above mentioned opinions, order and mandate are attached hereto.

JURISDICTION

The opinion of the Supreme Court of Kentucky was entered on May 1, 1979. The mandate of the Supreme Court of Kentucky was issued in petitioner's case on May 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the searches and seizures which produced the contraband drugs and other incriminating evidence were the fruits of the unconstitutional arrests of both petitioner and Vanessa Cox, in violation of the Fourth and Fourteenth Amendments of the Federal Constitution.

2. Whether the Fourth and Fourteenth Amendments were violated by the search of Vanessa Cox's purse and the seizure of its contents when that search was conducted pursuant to a warrant which authorized only a search of the premises of the residence in which she was a visitor.

3. Whether petitioner has standing to raise a clear violation of Vanessa Cox's Fourth Amendment rights as a violation of his own constitutional rights on the basis that he owned the property seized and the offense charged is the unlawful possession of that property.

4. Whether the search of petitioner's person, ostensibly conducted incident to a valid arrest, violated the Fourth and Fourteenth Amendments since probable cause for the arrest was predicated on the fruits of a prior illegal search and seizure of contraband drugs.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fourth and Fourteenth Amendments to the Federal Constitution.

STATEMENT OF THE CASE

In the middle of the afternoon of October 18, 1976, some six police officers, members of both the Kentucky State Police and a local law enforcement agency, armed with an arrest warrant for Lawrence Marquess, forcibly entered his residence in Bowling Green, Kentucky (Transcript of Evidence, hereinafter designated as T.E., pp. 132-133, 151-152, 181, 196; Transcript of Suppression Hearing of November 29, 1976, hereinafter designated as T.S.H. (I), pp. 2-3). Upon entering the premises, the police found five individuals in the living room of the Marquess residence - the petitioner David Rawlings, Vanessa Cox, Linda Braden, Keith Northern and Dennis Saddler. During the course of the search of the residence for Marquess, the officers noted the odor of burned marihuana and in another room observed marihuana seeds on a mantel (T.E., pp. 133-135, 152-153, 182, 197; T.S.H. (I), pp. 3-5). Marquess, who was under indictment for trafficking in Schedule I controlled substances, was not found during the search of his residence.

The police officers then decided that a search warrant for the house was needed and two of the officers left to procure the warrant (T.E., pp. 136, 153, 182, 197; T.S.H. (I), p. 5). During the forty-five minute wait for the two officers to secure the warrant and return to the residence, the five individuals, including petitioner, were detained in the living room and were informed by the police that they could not leave the room unless they consented to a search of their person (T.E., pp. 25-27, 38-40, 110-111, 153, 182-183, 197-198; Transcript of Suppression Hearing, December 1, 1976, hereinafter designated as T.S.H. (II), pp. 8-10).

Two of the individuals present, Linda Braden and Keith Northern, were permitted to leave after submitting to a search (T.E., pp. 26, 40, 110, 198; T.S.H. (II), p. 10).

After approximately forty-five minutes, the two police officers returned to the residence with a search warrant, authorizing a search of the premises (T.E., pp. 138-139, 154-155, 183; T.S.H. (I), pp. 5, 15). The warrant did not authorize the search of individuals on the premises.

One of the three individuals remaining in the living room, Vanessa Cox, was seated on a couch with her purse placed on the couch between her and petitioner (T.E., pp. 27, 45, 141; T.S.H. (I), p. 6). The officer ordered Vanessa Cox to stand and empty her purse onto the table. When the contents of the purse were emptied out, a large amount of controlled substances was exposed to view (T.E., pp. 27, 45, 149; T.S.H. (I), p. 8). Vanessa Cox informed the police officers that the drugs belonged to petitioner; at that juncture petitioner admitted that he was the owner of the drugs discovered in Ms. Cox's purse (T.E., pp. 28-29, 31, 47, 100-101, 149-150; T.S.H. (I), pp. 9, 12). Petitioner, prior to the initial arrival of the police, had placed the drugs in the purse belonging to Vanessa Cox (T.E., pp. 12-15, 23-24, 35, 100; T.S.H. (II), pp. 3-4, 20).

While the purse belonging to Vanessa Cox was being emptied, petitioner was asked by the police to stand to be searched. At that point petitioner admitted ownership of the drugs found in the purse and was immediately subjected to a search of his person. The search revealed a wad of bills in the amount of $4,500 and a knife in a sheath. Petitioner was then formally placed under arrest (T.E., pp. 46-48, 102, 145-146, 149-150, 156, 160; T.S.H. (I), pp. 9-10, 16-17; T.S.H. (II), pp. 11-13).

On October 27, 1976 petitioner, David Rawlings, was indicted by the Warren Circuit Court Grand Jury in

Bowling Green, Kentucky on four counts of trafficking in controlled substances classified in Schedules I, II and III in violation of Kentucky Revised Statutes (KRS) 218A.990(2) (Transcript of Record, hereinafter designated T.R., pp. 1-4). According to the indictments, the controlled substances were LSD, Benzphetamine, Methaamphetamine, and Methyprylan (T.R., pp. 1-4). On November 1, 1976, petitioner was also indicted in the Warren Circuit Court for the offense of trafficking in a controlled substance classified in Schedule II, Pentobarbitol, in violation of KRS 218A.990(2) (T.R., p. 9).

Petitioner on October 28, 1976 filed a pretrial motion "to suppress all evidence seized in this action because said evidence was derived from an illegal arrest ... without probable cause by the arresting officers" (T.R., p. 14). On November 18, 1976 petitioner filed another motion "to suppress all evidence seized in this action pursuant to a [s]earch [w]arrant ... in that said [s]earch [w]arrant does not specifically name any individual to be searched" (T.R., p. 44).

On November 29 and December 1, 1976, evidentiary hearings were held on the defense motions to suppress. At the latter hearing, petitioner took the witness stand and asserted his ownership of the drugs which the police had discovered in Ms. Cox's purse (T.S.H. (II), pp. 3-7).

The defense motions to suppress were overruled at the conclusion of the December evidentiary hearing (T.S.H. (II), pp. 27, 30).

Following the overruling of the suppression motions, petitioner sought and received the trial court's permission to waive his constitutional right to trial by jury (T.S.H. (II), pp. 30-34; T.R., pp. 48-49). Consequently, petitioner was tried by a judge alone on December 2 and 3, 1976.

At the conclusion of the presentation of evidence, the defense renewed its motion to suppress (T.E., p. 216). The trial judge then withheld the verdict and allowed the prosecution and defense to file simultaneous briefs on the merits of the suppression motion (T.E., p. 234; T.R., p. 56).

On February 11, 1977, the trial court again overruled the defense motions to suppress and also determined that petitioner was without standing to object to the search of Ms. Cox's purse and the seizure of the drugs found in the purse (T.R., pp. 90-94).

That same day petitioner, contrary to his plea, was convicted in the Warren Circuit Court of the offense of trafficking in a controlled substance classified in Schedule I in violation of KRS 218A.990(2) and was sentenced to imprisonment for five years and a fine of three thousand dollars ($3,000.00). Petitioner was also convicted of four counts of possession of controlled substances classified in Schedules II and III in violation of KRS 218A.990(6) and sentenced on each count to confinement in the county jail for one year and a fine of five hundred dollars ($500.00) (T.R., pp. 95-96). The sentences of confinement were to run concurrently for a total of five years of imprisonment (T.R., p. 101).

In a timely motion for a new trial, petitioner again asserted that the searches and seizures in his case were in violation of the United States Constitution (T.R., p. 97). That motion was denied on March 11, 1977 and final judgment was entered that same day (T.R., p. 101). A timely notice of appeal was filed by petitioner (T.R., p. 102).

On February 17, 1978 the Court of Appeals of Kentucky rendered its opinion in petitioner's case and affirmed the judgment of conviction and sentence. David Rawlings v. Commonwealth, Court of Appeals of Kentucky, File

No. CA-1185-MR, decided February 17, 1978. Kentucky's intermediate appellate court noted that on appeal petitioner essentially "contends that he had standing to complain about the search of Ms. Cox's purse; that the search of Ms. Cox's purse was not authorized by the warrant, based on probable cause, or justified by the exigencies of the circumstances involved; that the search warrant for the premises did not authorize the search of all persons on the premises; and that their detention was not based upon probable cause and was, in effect, unreasonable restriction of their freedom." Id.

The Court of Appeals determined that petitioner "did have standing to protest the search of Ms. Cox's purse," but decided the search of the purse was not invalid. Id.

On June 9, 1978 the Kentucky Court of Appeals denied petitioner's petition for rehearing. At that time, a dissenting opinion was filed in the case. The dissenting judge concluded that petitioner and Ms. Cox had been illegally arrested in violation of the Fourth Amendment and that this initial illegality rendered the subsequent searches and seizures also unconstitutional. The dissenter also rejected the majority's holding that the search of Ms. Cox's purse was within the scope of a warrant authorizing only the search of the premises.

Petitioner's timely motion for discretionary review was granted by the Supreme Court of Kentucky on November 14, 1978. On May 1, 1979 the Kentucky Supreme Court rendered its opinion in petitioner's case and affirmed the opinion of the Court of Appeals. Rawlings v. Commonwealth, 581 S.W.2d 348 (1979).

According to the majority opinion, "[t]he central issue in this case is the warrantless search of Vanessa Cox's purse." Id. at 349. In resolving that issue, the Kentucky court was "confronted with the proposition of 'standing' on the part of [petitioner] to raise the Fourth Amendment issue and the ultimate issue - the merits of the Fourth Amendment argument." Id.

The majority opinion of the Kentucky Supreme Court unabashedly announced, "All in all we confess that we find the concept of 'standing' totally incomprehensible and, to the extent of overlap with Fourth Amendment rights, equally incapable of understanding." Id.

Nevertheless, the majority held "the evidence obtained by the search of Vanessa Cox's purse was properly admitted at trial" and noted that petitioner "probably does not have standing to raise the issue here." Id at 349 (emphasis added).

The majority acknowledged that Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), "apparently would confer standing on the theory that possession of the drugs both convicts and confers standing since the offense here is possession, admitting ownership is admitting guilt." Id. But the Kentucky Supreme Court reasoned that petitioner "did not find himself in that dilemma" because "he admitted ownership of the drugs when the drugs appeared from the purse and Vanessa Cox stated the drugs belonged to him." Id.

Although admittedly "not sure of the effect of" Rakas v. Illinois, ____ U.S. ____, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), the majority of the Kentucky court felt Rakas "seems to reject the theory of Jones on 'standing.'" Rawlings v. Commonwealth, supra, at 349-350. Consequently, the Kentucky Supreme Court held "the search of Vanessa Cox's purse did not violate [petitioner's] legitimate or reasonable expectation of freedom from governmental intrusion." Id.

Addressing the issue of the search of petitioner's person, the majority "prefer[red] to validate this search on the theory of a search incident to a valid arrest." Id. The Kentucky Supreme Court emphatically stated its intention to "disregard as irrelevant the detention during which the officers were procuring a search warrant." Id.

Justice Lukowsky of the Kentucky Supreme Court filed a dissenting opinion in the instant case and concluded that "[t]he searches and seizures which occurred were the fruits of unlawful arrests and should be suppressed." Id. at 350, citing Wong Sun v. United States, 371 U.S. 481, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Judge Lukowsky reasoned that the conduct of the police officers who "would not allow those present to leave the room or the premises unless they would submit to a search ... constituted an arrest because it significantly deprived those individuals of their freedom of action." Rawlings v. Commonwealth, supra at 350, citing Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

According to the dissenting justice, this "was not an investigatory stop but an arrest." Rawlings v. Commonwealth, supra at 350. Justice Lukowsky emphasized that this arrest of petitioner and the others was unlawful because "no misdemeanor had been committed in the presence of the police." Id. at 350-351.

As the dissent explains, "[b]ut for the unlawful detention of [petitioner] and the others present in the house, the police would not have discovered any evidence against [petitioner]." Id. at 351. All the discovered evidence "was a result of the unlawful detention and should be suppressed as 'fruit of the poisonous tree.'" Id.

In the second portion of his dissent, Judge Lukowsky explained that, even if petitioner and the others present were not illegally arrested during the forty-five minute detention, "the search of Cox's purse was unlawful because the search was beyond the perimeter of the search warrant and consequently unreasonable under the Fourth Amendment." Id. at 351. The dissent preceived the "real issue" as "whetеher [petitioner] should be permitted to raise the clear violation of Cox's Fourth Amendment rights as a violation of his own on the basis that he owned the property seized and the offense charged is the possession of that property." Id.

The dissent characterized Rakas as "substantially different from the instant case" since it "involved a non-possessory offense and the articles seized were not owned by or in the possession of the defendants." Rawlings v. Commonwealth, supra at 351, citing Rakas v. Illinois, supra, 99 S.Ct. at 423 n. 1. The dissenting judge acknowledged that Rakas had "reformulated the test for standing to contest a search," but added that the decision "left undisturbed the automatic standing rule articulated in Jones v. United States, [citation omitted], for possessory offenses." Rawlings v. Commonwealth, supra at 351-352.

Because petitioner "is charged with a possessory offense," the dissenting judge chastised that "the Commonwealth should not be heard to say that his possession of these drugs is sufficient to support his conviction but insufficient to support a reasonable expectation of privacy when they are concealed in the purse of a companion." Id. at 352. According to the dissent, petitioner "was entitled to expect that governmental officals would intrude into the purse only with consent or by complying with the Fourth Amendment." Id. Because "the search of Cox's purse was an unreasonable search and seizure," the dissenting judge reasoned "its results should be suppressed." Id.

Lastly, addressing the search of petitioner's person, the dissent found that search "unlawful because it was not incident to a valid arrest." The "'second' arrest upon which the search was based was itself unlawful" since "it was based upon the fruits of the illegal search for and seizure of the drugs in Cox's purse." Id.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW HOLDING THAT PETITIONER LACKED STANDING TO RAISE THE CLEAR VIOLATION OF ANOTHER'S FOURTH AMENDMENT RIGHTS, EVEN THOUGH PETITIONER ADMITTED OWNERSHIP OF THE PROPERTY SEIZED AND THE OFFENSE CHARGED IS THE POSSESSION OF THE SEIZED PROPERTY, CONFLICTS WITH PREVIOUS DECISIONS OF THE SUPREME COURT.

As a general rule, Fourth Amendment rights may not be vicariously asserted. Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 965, 22 L.Ed.2d 176 (1969). To contest a search or seizure on Fourth Amendment grounds, a defendant must have either "actual standing" or "automatic standing."

Prior to 1960, under "the conventional standing requirement," courts had "generally required that the movant [seeking to suppress evidence obtained as a result of an unconstitutional search and seizure] claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched." Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 731, 4 L.Ed.2d 697 (1960).

By claiming ownership or possession of the seized property or by claiming a substantial possessory interest in the premises searched, a defendant could establish actual standing to contest the search and seizure. Throughout the evolution of the concept of standing to raise Fourth Amendment violations, this Court has acknowledged the constitutional principle that an actual ownership or possessory interest in that which was seized confers standing to challenge the search and seizure.

For example, in Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), a prosecution for a non-possessory offense, a suitcase containing evidence incriminating the defendant was found in the basement of a house belonging to another. On motion to suppress the defendant testified that the suitcase was his. This Court recognized that, "[u]nder the standing rules set out in Jones, there will be occasions, even in prosecutions for nonpossessory offenses, when a defendant's testimony will be needed to establish standing." Simmons v. United States, supra, 88 S.Ct. at 974. "The only, or at least the most natural, way in which [the defendant in Simmons] could found standing to object to the admission of the suitcase was to testify that he was its owner." Id., 88 S.Ct. at 974-975. "Thus, his testimony is to be regarded as an integral part of his Fourth Amendment exclusion claim." Id.

As recently as 1973, this Court reiterated that "[u]nder the Simmons doctrine the defendant is permitted to establish the requisite standing by claiming 'possession' of incriminating evidence." Brown v. United States, 411 U.S. 223, 93 S.Ct. 1565, 1569, 36 L.Ed.2d 208 (1973). To illustrate this point, this Court suggested that the defendants in Brown "could have asserted, at the pretrial suppression hearing, a possessory interest" in the evidence seized to establish standing.

A defendant is entitled to automatic standing under the doctrine originally formulated in Jones v. United States, supra, if he is charged with a crime that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.

When "possession of the seized evidence is itself an essential element of the offense with which the defendant is charged, the Government is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence." Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 974, 19 L.Ed.2d 1247 (1968).

Automatic standing "eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged." Jones v. United States, supra, 80 S.Ct. at 732. "The possession on the basis of which [a defendant] is to be ... convicted suffices to give him standing." Id. "In cases where the indictment itself charges possession, the defendant in a very real sense is revealed as a 'person aggrieved by an unlawful search and seizure' upon a motion to suppress evidence prior to trial." Id., 80 S.Ct. at 733.

Recently in Rakas v. Illinois, ____ U.S. ____, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), this Court reconsidered the portion of the Jones decision which dealt with standing based on an interest in the premises searched and the principles that should control such cases. However, the substance of the opinion reaffirmed the principle recognized in Jones that a possessory or ownership interest in the eivdence seized confers actual standing. United States v. Mazzelli, 595 F.2d 1157, 1160 (9th Cir. 1979).

For example, in Rakas this Court initially emphasized the failure of the defendants to assert a claim of ownership over the items seized. Rakas v. Illinois, supra, 99 S.Ct. at 423-424 n. 1. This comment implicitly recognizes that a possessory interest in the seized evidence confers standing to challenge the seizure. Later in the decision, after asserting that a "casual visitor" to the premises should not be able to contest the impropriety of the search, this Court added that "[t]his is not to say that such visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search." Rakas v. Illinois, supra at 430 n. 11.

Finally, in holding that the petitioners' claim in Rakas must fail, this Court stressed that "[t]hey asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized." Rakas v. Illinois, supra, 99 S.Ct. at 433 (emphasis added).

The Rakas opinion repeatedly endorses the proposition that actual standing is established by a possessory or ownership interest in the property seized.

Although this Court in Rakas acknowledged that it has "not yet had occasion to decide whether the automatic standing rule of Jones survives [the] decision in Simmons," it remains undeniable that the concept of automatic standing in possession offenses is still a viable principle of constitutional law which is binding precedent on the state and federal courts. Rakas v. Illinois, supra, 99 S.Ct. at 426 n. 4, citing Brown v. United States, supra, 93 S.Ct. at 1568-1569. Until this Court expressly rules otherwise, the automatic standing doctrine of Jones continues to provide standing for defendants facing trial on possession charges.

Petitioner in the case at bar met his burden of establishing actual standing due to his admission of ownership of the drugs seized from Ms. Cox's purse both at the time of the search and later at the suppression hearing.

Additionally, since the possession of the seized drugs is itself an essential element of the charged offenses,[1] petitioner was entitled to automatic standing under the still viable rationale of Jones.

Despite petitioner's clear constitutional entitlement to challenge the search of Ms. Cox's purse on the basis

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[1] KRS 218A.990(2) provides that "[a]ny person who knowingly and unlawfully traffics in a controlled substance classified in Schedules I or II other than a narcotic drug, except marijuana, or in any controlled substance classified in Schedule III," commits a criminal offense. "Traffic" as used in KRS 218.A.990(2) "means to manufacture, sell, transfer or possess with intent to sell a controlled substance." KRS 218A.010(19).

Similarly, KRS 218A.990(6) provides that "any person who knowingly and unlawfully possesses any controlled substance classified in Schedules I, II, or III which is not a

of either actual or automatic standing, the Supreme Court of Kentucky stated that petitioner "probably does not have standing to raise the issue" of the warrantless search of the purse and held the evidence obtained by the search "was properly admitted at trial." Rawlings v. Commonwealth, supra at 349. This decision to deny petitioner standing was made in the context of the Kentucky Supreme Court's "confession" that "the concept of 'standing' [is] totally incomprehensible and, to the extent of overlap with Fourth Amendment rights, equally incapable of understanding." Id. at 349. The Kentucky Supreme Court added that they were "not sure of the effect of Rakas," but felt that the decision "seems to reject the theory of Jones on "standing." Rawlings v. Commonwealth, supra at 349-350.

The published decision of the Kentucky Supreme Court in petitioner's case constitutes an interpretation of federal constitutional law which is binding on the inferior appellate and trial courts of Kentucky. This opinion, at least in the state courts of Kentucky, nullifies the doctrine of actual standing based on an interest in the property seized and abrogates the principle of automatic standing in possession offenses. Unless this Court acts to rectify this conflict between the decision at bar and the binding precedents of this Court, criminal defendants in Kentucky facing possession offenses or asserting a possessory interest in the evidence seized from another person will be deprived of the opportunity to challenge the constitutionality of that search and seizure.

This conflict between Kentucky's interpretation of the constitutional principles of standing and this Court's prior decisions assumes even greater significance in view of the limitations on federal collateral review of Fourth Amendment issues imposed by Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

The conflicts detailed above justify the grant of certiorari to review the judgment below.

2. THE DECISION BELOW HOLDING THAT PETITIONER LACKED STANDING TO RAISE THE CLEAR VIOLATION OF ANOTHER'S FOURTH AMENDMENT RIGHTS, EVEN THOUGH PETITIONER ADMITTED OWNERSHIP OF THE PROPERTY SEIZED AND THE OFFENSE CHARGED IS THE POSSESSION OF THE SEIZED PROPERTY, CONFLICTS WITH THE DECISIONS OF VARIOUS FEDERAL COURTS.

As previously explained, the Supreme Court of Kentucky ruled in the case sub judice that petitioner "probably does not have standing to raise the issue" of the warrantless search of Vanessa Cox's purse. Rawlings v. Commonwealth, supra at 349. The Kentucky court, although admittedly "not sure of the effect of Rakas" on the doctrine of standing, utilized that decision to deny petitioner actual standing and automatic standing to contest the search of the purse and the seizure of the drugs. Id. at 349-350.

Recently, the Court of Appeals for the Ninth Circuit addressed the issue of whether this Court's recent decision in Rakas altered in any way the doctrine of actual standing arising from an ownership or possessory interest in the evidence seized. United States v. Mazzelli, 595 F.2d 1157 (9th Cir. 1979).

In Mazzelli defendant Conway moved to suppress the cocaine discovered during a search of the suitcase carried by defendant Mazzelli. Mazzelli was indicted for possession and conspiracy, while Conway was indicted solely on the offense of conspiracy. Id. at 1157-1158. The issue on appeal was whether Conway had standing to move to suppress the cocaine as the fruit of an unlawful search. Conway asserted standing on two grounds: (1) ownership of the suitcase which was searched; and (2) a claim of a

possessory interest in the cocaine which was seized. Id. at 1158.

The Mazzelli court held Conway had established actual standing, as distinguished from automatic standing, on the basis of his possessory interest in the cocaine. Id. at 1159-1160. The Ninth Circuit Court of Appeals analyzed the Rakas decision and concluded "in substance [Rakas] reaffirmed the proposition recognized in Jones that a possessory interest in that which was seized confers standing." United States v. Mazzelli, supra at 1159-1160.

The Mazzelli analysis of the impact of Rakas on the doctrine of actual standing generated by a possessory interest in the thing seized conflicts with the decision of the Kentucky Supreme Court in petitioner's case.

At least one federal court of appeals and one federal district court have observed that "[t]he Supreme Court has questioned, but has not decided, whether the concept of automatic standing as expounded in Jones . . . remains viable in light of Simmons v. United States." United States v. Balsamo, 468 F.Supp. 1363, 1378 n. 19 (S.D. Me. 1979), citing Rakas v. Illinois, supra, 99 S.Ct. at 426 n. 4; United States v. Reyes, 595 F.2d 275, 279 n. 2 (5th Cir. 1979). However, both federal courts indicated they "will assume that the automatic standing rule of Jones has not been implicitly overruled by Simmons until the Supreme Court rules on that issue." United States v. Balsamo, supra at 1378 n. 19; United States v. Reyes, supra at 279.

The decisions of these two federal courts to continue to treat the doctrine of automatic standing in possession offenses as a viable constitutional principle conflicts dramatically with the Kentucky Supreme Court's decision in petitioner's case to consider that the Rakas decision has rejected the automatic standing concept enunciated in Jones.

The conflicts detailed above justify the grant of certiorari to review the judgment below.

3. THE DECISION BELOW WHICH DISREGARDS AS IRRELEVANT ANY EFFECT OF THE WARRANTLESS DETENTION OF PETITIONER AND OTHERS ON THE SUBSEQUENT SEARCHES AND SEIZURES CONFLICTS WITH PREVIOUS DECISIONS OF THE SUPREME COURT.

In his dissenting opinion in petitioner's case, Justice Lukowsky of the Kentucky Supreme Court reasoned that "[t]he searches and seizures which occurred were the fruits of unlawful arrests and should be suppressed." Rawlings v. Commonwealth, supra at 350, citing Wong Sun v. United States, 371 U.S. 481, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Justice Lukowsky contended that the conduct of the police officers who "would not allow those present to leave the room or the premises unless they would submit to a search ... constituted an arrest because it significantly deprived those individuals of their freedom of action." Rawlings v. Commonwealth, supra at 350, citing Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

According to the dissenting justice, this "was not an investigatory stop but an arrest." Rawlings v. Commonwealth, supra at 350. Justice Lukowsky emphasized that this arrest of petitioner and the others was unlawful because "no misdemeanor had been committed in the presence of the police." Id. at 350-351.

As the dissent explains, "[b]ut for the unlawful detention of [petitioner] and the others present in the house, the police would not have discovered any evidence against [petitioner]." Id. at 351. All the discovered evidence "was a result of the unlawful detention and should be suppressed as 'fruit of the poisionous tree.'" Id.

The majority opinion in the case sub judice completely neglects this entire constitutional issue and "disregard[s] as irrelevant the detention during which the officers were procuring a search warrant." Id. at 350.

Recently in Dunaway v. New York, ____ U.S. ____, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), this Court concluded that the police "violated the Fourth and Fourteenth Amendments when, without probable cause to arrest, they took petitioner into custody, transported him to the police station and detained him there for interrogation." Id., 99 S.Ct. at 2253, 2258.

This Court in Dunaway reiterated that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Id., 99 S.Ct. at 2253 n. 6, citing Terry v. Ohio, supra, 88 S.Ct. at 1877.

Citing to Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 679 (1969), and Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), this Court in Dunaway concluded that "detention for custodial interrogation - regardless of its label - intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." Dunaway v. United States, supra, 99 S.Ct. at 2258.

Under the facts of the instant case, petitioner, Vanessa Cox, and the three other individuals were detained for approximately forty-five minutes. The detention was not accomplished as a formal arrest and it was not for the purpose of custodial interrogation. Nevertheless, under the Dunaway analysis, this detention of petitioner and the others was an "investigatory seizure" which intruded so severely on the interests protected by the Fourth Amendment that it could be justified only on the basis of probable cause to arrest.

The refusal of the Kentucky Supreme Court to determine the constitutionality of the investigatory seizure of petitioner and the others at the Marquess residence and its effect on the subsequent searches of these people is in conflict with this Court's decisions in Dunaway, Brown, and Davis, all supra.

The conflicts detailed above justify the grant of certiorari to review the judgment below.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Kentucky.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

DAVID RAWLINGS,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

CERTIFICATE OF SERVICE

I, J. Vincent Aprile II, counsel for petitioner, hereby certify that the attached Petition for Writ of Certiorari, Motion For Leave To Proceed In Forma Pauperis, Affidavit of Indigency, and Notice of Appearance were served on respondent by depositing copies of the aforementioned documents in the United States mail, first-class postage prepaid, on July 27, 1979 addressed to respondent's counsel, Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601.

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